

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 OFFICE OF INDEPENDENT :
4 COUNSEL, :
5 Petitioner :
6 v. : No. 02-954
7 ALLAN J. FAVISH, ET AL. :
8 - - - - -X
9 Washington, D.C.
10 Wednesday, December 3, 2003
11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States at
13 10:02 a.m.
14 APPEARANCES:
15 PATRICIA A. MILLETT, ESQ., Assistant to the Solicitor
16 General, Department of Justice, Washington, D.C.; on
17 behalf of the Petitioner.
18 JAMES HAMILTON, ESQ., Washington, D.C.; for Respondents
19 Anthony and Moody; on behalf of the Petitioner.
20 ALLAN J. FAVISH, ESQ., Santa Clarita, California; on
21 behalf of the Respondent Favish.

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1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	PATRICIA A. MILLETT, ESQ.	
4	On behalf of the Petitioner	3
5	JAMES HAMILTON, ESQ.	
6	For respondents Anthony and Moody,	
7	On behalf of the Petitioner	17
8	ALLAN J. FAVISH, ESQ.	
9	On behalf of the Respondent Favish	24
10	REBUTTAL ARGUMENT OF	
11	PATRICIA A. MILLETT, ESQ.	
12	On behalf of the Petitioner	49
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 02-954, the Office of Independent Counsel v.
Allan J. Favish.

Ms. Millett.

ORAL ARGUMENT OF PATRICIA MILLETT
ON BEHALF OF THE PETITIONER

MS. MILLETT: Mr. Chief Justice, and may it
please the Court:

In the course of their investigative work,
Federal law enforcement officials, of necessity, routinely
come into possession of substantial amounts of highly
sensitive and highly personal information. Sometimes that
information includes graphic death scene and autopsy
photographs. Those photographs are taken for the limited
and restricted use of law enforcement and public safety
officials. They are not freely available to the general
public as a matter of law, custom, or practice.

The question presented in this case is whether
death scene photographs should be broadly disclosed to the
general public under the Freedom of Information Act. They
should not. The Freedom of Information Act's purpose is
not maximum disclosure, but responsible disclosure, and
the publication of death scene photographs goes beyond the

1 bounds of responsible disclosure, because in the terms of
2 exemption 7(C), production could reasonably be expected to
3 constitute an unwarranted invasion of the personal privacy
4 of surviving family members.

5 In ordering the release of four photographs in
6 this case, the court of appeals recognized that that
7 substantial intrusion on privacy would occur, but it then
8 committed three errors in assessing the countervailing
9 public interest in disclosure.

10 QUESTION: Must there be identifiable family
11 members to suffer this invasion of privacy? Would it just
12 be automatic instead? The - a scene like this, you would
13 assume that there was someone?

14 MS. MILLETT: No, the - the practice of the
15 Federal Government is that we need to identify the
16 existence of a survivor. There was a case in the D.C. -
17 excuse me - District Court, named Outlaw, that I believe
18 was cited in respondent's brief, where the Department of
19 Defense had asserted survivor privacy without having first
20 identified a survivor, and that was held to be
21 impermissible, and as a matter of practice, because this
22 is sort of specialized application of privacy interest,
23 the Government identifies a survivor before invoking it.
24 But that is often not a difficult job because the types of
25 records that bring the photos to us, law enforcement

1 records, military records when it's a military service
2 member who's been autopsied, will often contain, or allow
3 the identification, of family members.

4 QUESTION: And if you're so unfortunate as not to
5 have survivors, or to have survivors who don't like you,
6 the most embarrassing and gory photographs of your body
7 can be released?

8 MS. MILLETT: Well, Justice Scalia, that has been
9 the practice after the Outlaw decision of the Federal
10 Government. It - it's not inconceivable to me that
11 because you're talking about an objective test, at least
12 under 7(C) - some of these photographs are held - upheld
13 under - or withheld under exemption 6, which doesn't have
14 the same objective test language. It's not inconceivable
15 that the Government could justify withholding, in a
16 situation like after the collapse of the World Trade
17 Center towers, and their substantial amounts of - sorry,
18 but, for the graphic nature - but partial remains that
19 can't be matched with particular individuals.

20 But we know that for some significant percentage
21 of those people, there are a significant percentage of
22 survivors on a match for match. In that case, I think we
23 would argue should not be required and that withholding
24 could be done because we -

25 QUESTION: But only on the assumption that there

1 are survivors?

2 MS. MILLETT: On the assumption that there - a
3 reasonable - obviously, a reasonable assumption -

4 QUESTION: I don't know why that's necessary. I
5 don't know why you - you can't say, and I think some
6 courts have held, have they not, that - that there is a
7 privacy interest in the - in the person who's died?

8 MS. MILLETT: For the most part, courts have said
9 that privacy dies with the individual, but again, the
10 problem in this case is the Ninth Circuit didn't think we
11 were withholding too little. It rule - it ruled that we
12 were withholding too much that - and that, in fact, when
13 there are known survivors, these - these disturbing
14 photographs still have to be released. `And in doing that,
15 they committed three errors.

16 QUESTION: Before we get to that though, on the
17 question that was asked, if there are no survivors, given
18 that the main rule of FOIA is disclosed, unless you fall
19 under an exemption, and exemptions are to be narrowly
20 construed, I don't think the - the Government could
21 suppose, could hypothesize an interest that may or may not
22 have existed in the decedent when there are no survivors.

23 MS. MILLETT: Well, Justice Ginsburg, that has
24 been the Government's practice, is to identify a survivor,
25 but again, I think our position is, because the nature of

1 our world has changed and we now have to deal with
2 situations involving mass deaths, that we aren't going to
3 insist when you have a large collection of remains and we
4 know that for some percentage of those there - there are
5 survivors, that withholding would still be permissible.

6 QUESTION: But why is that any less of a leap
7 than saying the deceased - the deceased's privacy is being
8 invaded? Why is it less of a leap to say that the privacy
9 - the privacy of the survivors is being invaded? It
10 doesn't seem to me that it's - it's their privacy that's
11 being invaded. It's - it's their - their sensitivity,
12 various other things, but - but it seems to me strange to
13 speak of their having a privacy interest. Surely they
14 have an interest in not having their - their - their
15 relative displayed this way, but I - I wouldn't normally
16 call that a privacy interest.

17 MS. MILLETT: Well, Justice Scalia, the common
18 law - a number of common law courts did, and they did -
19 and we cite - one of the very first common law courts ever
20 to recognize the right to privacy, in 1895, the Schuler v.
21 Curtis case, which is cited in our reply brief, found
22 exactly a privacy interest in the survivors, and it said
23 it is not the privacy interest of the deceased, because
24 under the common law tradition, privacy dies with the
25 individual.

1 But what's being protected here is the
2 survivors. It sort of takes three forms, first of all,
3 their - their memory of the deceased, their ability to
4 provide a dignified disposition of the body, and the
5 ability to have seclusion in their grief and repose and
6 closure. And those concepts packaged together have been
7 recognized as a privacy right, both at tort law by a
8 number of courts, and more broadly, by custom and practice
9 in this country. These types of photographs are not
10 freely available virtually anywhere. A large number of
11 states, as we've cited in our brief, prevent their
12 disclosure or have restrictions on their disclosure.

13 QUESTION: Well, I guess we're, in this case,
14 asked to apply FOIA's exemption 7(C) to interpret it
15 anyway.

16 MS. MILLETT: Yes.

17 QUESTION: Right?

18 MS. MILLETT: Yes.

19 QUESTION: So that's what we're focused on.

20 MS. MILLETT: Yes.

21 QUESTION: And what do you propose as the test?

22 MS. MILLETT: The test - the test is, as this
23 Court has - to decide whether a - a invasion of privacy is
24 clearly unwarranted, you have to weigh and balance the
25 intrusion on privacy against the extent to which the

1 information disclosed would, in this Court's Reporters
2 Committees decision, contribute significantly to public
3 understanding of the operations or activities of the
4 Federal Government. And in this case, on one side of the
5 balance is a substantial intrusion on privacy, requiring -
6 exposing this sort of information out where family members
7 will see it, encounter it, where they will know that their
8 - that their loved one has not been buried in any sense.

9 QUESTION: Is that the test that the CADC used in
10 the Accuracy in Media case involving these same photos?

11 MS. MILLETT: They used a - the same balancing.
12 They recognized the -

13 QUESTION: So whatever you're proposing, you
14 think the CADC correctly employed in that case?

15 MS. MILLETT: The - there - with - with one
16 qualification, which I don't think is a distinction -
17 don't think it's a distinction that makes a difference.
18 Certainly on the privacy interest side, they agreed with
19 us that there's a survivor privacy interest and that that
20 has to be balanced under this Court's Reporters Committee
21 standard.

22 Now, the D.C. Circuit has said with - when the
23 public interest that's asserted is substantial allegation,
24 or is unsubstantiated allegations of governmental
25 misconduct, that's not enough. They require compelling

1 evidence of governmental misconduct to overcome the
2 presumption of regularity. We've articulated the test is
3 clear as evidence. I don't think in practice there's any
4 difference. We've employed the clear evidence standard
5 because that's the standard this Court has adopted for
6 overcoming a presumption of regularity.

7 QUESTION: I'm - I'm - I'm glad you backed off
8 from compelling evidence. It seems to me if there were
9 compelling evidence of Government's misdoing, you wouldn't
10 need the photographs. If it was already compelling, the
11 photographs would - would not prove anything additional
12 and you would - you would reject it for that reason,
13 right?

14 MS. MILLETT: That may - that may well be. The
15 compelling - the way the compelling evidence standard
16 works, as we understand it, and the way the clear evidence
17 standard works that we propose is not that that means you
18 get the photographs. It just means that you have
19 something of weight on your side of the balance. We think
20 the unsubstantiated allegations of governmental misconduct
21 are worth virtually none, if no weight -

22 QUESTION: But are the - does the term compelling
23 interest refer to the allegations that the person seeking
24 the photographs makes, or the evidence he has supporting
25 his position?

1 MS. MILLETT: It has to be the - the evidence of
2 governmental misconduct. Empty allegations -

3 QUESTION: Independently of what the - the
4 photographs themselves would show?

5 MS. MILLETT: That - I mean, that presumably will
6 not be the evidence, right, you can't just come say that -
7 that would be sort of boot-strapping to say that the
8 evidence is the - I have to see that so that I will have
9 my evidence of your governmental misconduct, which
10 essentially -

11 QUESTION: Okay, tell me again what - what the
12 test is as you - you understand it.

13 MS. MILLETT: The - the test - you mean with
14 respect to unsubstantiated allegations of governmental
15 misconduct?

16 QUESTION: Yes.

17 MS. MILLETT: That is that the FOIA requester
18 must come forward with clear evidence of governmental
19 misconduct on their own, independent evidence on their
20 own, to have a cognizable public interest to weigh against
21 the intrusion on privacy that has occurred in this case.
22 And that is the standard that this - the clear evidence
23 standard comes from this Court's decisions, which say that
24 is the quantum of evidence needed to overcome the
25 presumption of regularity and legitimacy that attaches in

1 this case to law enforcement investigations.

2 QUESTION: Does the Government - does the
3 Government - as I understand FOIA, the Government has the
4 burden of proof, the Government presents an exemption and
5 it is the Government's burden to show that the exemption
6 applies, not the requester, because going in, am I right
7 to say, the requester can ask for this information for any
8 reason or no reason?

9 MS. MILLETT: That - that's - with respect -
10 until an exemption is triggered, there's no need to have
11 any reason for your FOIA. You can have a good reason, a
12 bad reason, or no reason to ask for information, but -

13 QUESTION: So what is the Government's burden
14 that it has, at least the initial burden is on the
15 Government to show what?

16 MS. MILLETT: The - the initial burden on the
17 Government is once an exemption - we have to show that an
18 exemption is triggered. We have to, in this situation,
19 identify a cognizable privacy interest which -

20 QUESTION: Now, after you point to which number,
21 7, you point to 7(C) and that - that - the burden must be
22 more than just, say -

23 MS. MILLETT: No, that - that's right, in fact,
24 we get the written steps. We have to identify a
25 cognizable privacy interest and then, before we make a

1 decision to withhold, we ourselves must make the - must
2 balance. It's our job to do this balancing before we
3 invoke an exemption, so we ourselves will then try to
4 identify if we can from the requester's papers or on our
5 own what public interest would be served by the disclosure
6 of these documents.

7 Now, it's not the particular interest of the
8 requester, but it's the relationship between this document
9 and serving the public interest that was identified in
10 Reporters Committee of revealing the operations or
11 activities of the Government. So in this case, we looked,
12 we found a substantial privacy interest here, and then we
13 looked at photographs of a deceased body at a death scene
14 and in our judgement, these reveal nothing about the
15 operations or activities of the Office of Independent
16 Counsel and - and -

17 QUESTION: Ms. Millett, you - you - you say that
18 you have to show clear evidence of - have clear evidence
19 of government misconduct. What do you mean by misconduct?
20 What - what has been brought forward here, at least, are
21 some disparities in - in various governmental reports,
22 which suggest that at least there was negligence or
23 sloppiness in some of the reports. Is that enough to
24 establish what you mean by governmental misconduct? Or
25 does it have to be some willful cover-up?

1 MS. MILLETT: Justice Scalia, first of all, I
2 don't think there's any evidence of negligence or
3 sloppiness here, but if we adopt that -

4 QUESTION: All right, well, we - we'll get to
5 that, I assume, right? Okay.

6 MS. MILLETT: If we adopt that characterization,
7 the fact that someone cannot - can identify something more
8 that they should have been done, or the fact that - that
9 they disagree with the ultimate result, is not
10 governmental misconduct. The type of thing that might
11 rise - that - that might count, is something that was - if
12 you had evidence that, you know, governmental
13 investigators had suborned perjury, and you had evidence
14 in the form of -

15 QUESTION: Willful? Has to be willful?

16 MS. MILLETT: I'm sorry?

17 QUESTION: Has to be willful? It cannot be just
18 a sloppy job? Why - why isn't that of interest to the
19 public?

20 MS. MILLETT: I don't - I - I don't think - well,
21 if - if they've got evidence of a sloppy job, then FOIA
22 has already worked. They can - the purpose of FOIA is not
23 - it's not a 60(b) motion to reopen an investigation or to
24 make us investigate more. It's to see - learn what the
25 Government did and then critique it as much as you like.

1 QUESTION: Okay. Why - why then do you take the
2 - I'm sorry - why - why do you take the position that to
3 satisfy the - the - the condition of revealing the
4 operation of the Government, it's necessarily got to
5 reveal something to the discredit of the Government? What
6 if someone came along and said, I think this was a superb
7 investigation, and the Government is far too modest about
8 what it has done, and I - I want the country to know?
9 Would - would that support a claim?

10 MS. MILLETT: Well, Justice Souter, let me be
11 very clear. We're talking here about the allegations of
12 misconduct because that is the public interest that is
13 asserted. One might be able to -

14 QUESTION: Right, but if misconduct - my - the
15 reason I'm raising the question is, if misconduct does not
16 have to be shown, I suppose that would have a bearing on
17 the degree of misconduct in a case like this that would -
18 that would suffice.

19 MS. MILLETT: Well, a public interest has to be
20 identified at some point, and the problem with this case
21 is, or the problem -

22 QUESTION: No, but what about my question for a
23 minute?

24 MS. MILLETT: Right.

25 QUESTION: Why is - why is it an illegitimate

1 public interest for somebody to come along and say, I want
2 to make the Government look good. They are hiding their
3 light under a bushel. I - I want the people to know how -
4 how fine they've done. Why is that not a - a possible
5 legitimate objective under the statute?

6 MS. MILLETT: Well, I think that - that - that is
7 sort of nothing more than - than a desire to show what the
8 Government did in this investigation, transparency in
9 government interest, which is the point of FOIA. But once
10 you've come to an - applying an exemption, you're going to
11 need something more on your side than just serving the
12 general interests that FOIA itself advances, because
13 otherwise, the exemption doesn't work as an exemption.
14 You have to want - want something more than transparency
15 in government.

16 Now, it may not be that you have to show
17 misconduct. You might be able to do it because there's
18 some other sort of acute public interest that's going to
19 outweigh it, but I think in the end, the public interest
20 in making the Government look good or telling the
21 Government - tell the public more about what the
22 Government did is never going to be enough to outweigh the
23 privacy interests of individuals. You can do that with
24 the substantial amounts of disclosures that have already
25 been made.

1 I would like to reserve the balance of my time
2 for rebuttal.

3 QUESTION: Very well, Ms. Millett.

4 We'll hear from you, Mr. Hamilton.

5 ORAL ARGUMENT OF JAMES HAMILTON

6 FOR RESPONDENTS ANTHONY AND MOODY

7 ON BEHALF OF THE PETITIONER

8 MR. HAMILTON: Mr. Chief Justice, and may it
9 please the Court:

10 There are five basic reasons why the privacy
11 interest at issue in this case should be protected.
12 First, the Foster family seeks to protect their own,
13 wholly legitimate privacy interests. The privacy
14 interests here of the family are to be free from seeing
15 these photographs on television and in grocery store
16 tabloids, to be free from the knowledge that these
17 photographs are displayed in virtual perpetuity on
18 ghoulish Web sites that show death and carnage, to be free
19 from the harassment by the media that inevitably will
20 follow if these photographs are released.

21 Second, while FOIA privacy protection is
22 broader, there is significant common law authority that a
23 survivor's right of privacy is violated by showing
24 photographs of deceased loved ones. The Restatement of
25 Torts recognizes this, so does Reid v. Pierce County, a

1 1998 decision by the Supreme Court of Washington, en banc,
2 which allowed a cause of action for displaying the autopsy
3 photographs of former Governor, Washington Governor, Dixie
4 Lee Ray, at cocktail parties.

5 Third, every FOIA case that has examined the
6 issue has found that in appropriate circumstances,
7 survivors have a proper - a privacy interest. The Ninth
8 Circuit and the D.C. Circuit did so in the cases involving
9 these photographs. There is a 1987 opinion in the D.C.
10 Circuit of *Badhwar v. Air Force* that does so regarding
11 autopsy reports, and Justice Ginsburg joined in that
12 opinion.

13 QUESTION: Mr. Hamilton, assume we agree with you
14 on all of that. We haven't heard anything about the other
15 - the other half of the inquiry, and that is what the
16 public interest is in - that might overcome that - that -
17 that privacy interest. I'm sure the other side is going
18 to - is going to talk about that, the - the alleged
19 discrepancies in the reports and whatnot. Can - can you
20 shed some light on that?

21 MR. HAMILTON: Well, Justice Scalia, we think
22 that there is no public interest on the other side. We
23 think as - as counsel for the Solicitor General has said,
24 that there's a strong evidence test for showing that there
25 is government - government misconduct where that is the

1 allegation of the public interest, which is the situation
2 here. A - a number of courts have said that the test
3 should be compelling evidence. The D.C. Circuit has done
4 that in several cases. The Fourth Circuit has done it.
5 Other circuits have come to other standards in - in terms
6 of what the public interest should be, but it must be
7 something that is strong, that is not insubstantial.

8 Secondly, in determining what the public
9 interest is, the Court must be aware that there have been
10 five investigations, five investigations of Mr. Foster's
11 death, and all of them have found that he died by suicide.
12 These investigations have released over 3,000 documents
13 over -

14 QUESTION: Yes, but it seems to me that the -
15 arguably, the interest in disclosure might not challenge
16 the ultimate conclusion, but rather they might contend -
17 want to show that one of the team of investigators was
18 totally incompetent, and it was necessary to have three or
19 four other investigations to reach the correct result. I
20 don't think the ultimate conclusion necessarily answers
21 the - the claim that there may be some public interest in
22 how the investigation was conducted.

23 MR. HAMILTON: Well, Justice Stevens, the - 7(C)
24 requires a balancing, and when you have this balance, you
25 have to weigh whatever the public interest is against the

1 privacy interest. And here, where there have been five
2 investigations, where the reports are voluminous, where
3 the documents released and the photographs already
4 released are voluminous, it is very difficult to see what
5 the public interest is in getting these photographs, which
6 would grossly invade the privacy of the family. The other
7 point on the public -

8 QUESTION: Well, let - let's take a particular
9 item of evidence, I mean, like the - the autopsy report
10 that Mr. Favish claims was - was - was altered, that the
11 word neck was white - whitened out and head was written in
12 instead to - to cover the fact that the bullet exited the
13 neck rather than the head. Now, you know, what - what he
14 and other conspiracy theorists would say is, the fact that
15 five investigations came up with the same conclusion just
16 shows the extent of this - this conspiracy, you know.
17 They're not going to be satisfied by the mere fact that -
18 that you had five separate groups. They're going to say,
19 oh, all the worse, all the worse, this - this conspiracy
20 is so widespread. Well, how do you respond to that?

21 MR. HAMILTON: Well, I think the first response I
22 would make is that it is a difficult argument to make that
23 Judge Starr conspired with members of the Clinton
24 administration to protect that administration.

25 (Laughter.)

1 MR. HAMILTON: Judge Starr - Judge Starr's report
2 was quite thorough, it was over 110 pages. He answered
3 this question about the - the - the medical report. The
4 medical report was somewhat inconsistent, but certainly,
5 when you look at the autopsy reports, when you look at the
6 - the - the photographs themselves, it is clear that the -
7 there - there was a - an exit wound in the back of the
8 head. There was no -

9 QUESTION: He might have been protecting Newt
10 Gingrich. Did you ever think of that?

11 MR. HAMILTON: I - I beg your pardon?

12 QUESTION: Mr. Starr might have been protecting
13 Newt Gingrich. We really - we really don't know.

14 (Laughter.)

15 QUESTION: May - may I ask -

16 MR. HAMILTON: Justice -

17 QUESTION: - the - I wanted to ask this question
18 of the Government, didn't have the opportunity. The
19 Government says there were three errors made by the Ninth
20 Circuit. I assume the district court, under the
21 Government's test, does have substantial discretion even
22 if we - if we adopt the test the Government wants us to
23 adopt. And my question is whether or not, rather than
24 simply reverse and remand - and reverse, we have to remand
25 for the district court to do this under the proper test?

1 MR. HAMILTON: Well, I would hope - I would hope,
2 given the full record here, that this Court would not
3 remand, that this Court would decide this issue. It has
4 been, Justice Kennedy, 10 years since -

5 QUESTION: I - I understand, but as a - as a
6 legal matter, if the Ninth Circuit didn't apply the proper
7 test and if the district judge has to exercise discretion
8 in the first entrance - instance - whether or not we have
9 to remand even if we adopt the Government's argument?

10 MR. HAMILTON: I - I believe that on the record
11 before the Court, the Court can decide that there is no
12 valid public interest here, and that the interest of - the
13 privacy interest of the Foster family greatly outweighs -

14 QUESTION: So you want us to do that weighing?

15 MR. HAMILTON: I - I certainly do. I want this
16 case to end at this Court, Justice Kennedy. It has been
17 10 years and it is time to give this family some peace.

18 QUESTION: That was the initial position of the
19 district court, wasn't it? In the - in the first round,
20 didn't the district court uphold the exemption?

21 MR. HAMILTON: The - yes, Justice Ginsburg.

22 QUESTION: So the district judge - what - I don't
23 recall what standard the district court applied in the
24 first instance, but it was the Ninth Circuit that - that
25 said, district court, you have to look at these and

1 disclose the ones that aren't, whatever that series of
2 adjectives is.

3 QUESTION: Yes. That - that's my concern. Is
4 there evidence that the district court used the standard
5 that the Government now argues for in the first - when he
6 - when the - Judge Keller first looked at this case, did
7 he adopt basically what the Government is asking us to
8 adopt?

9 MR. HAMILTON: Not - not exactly. No, he did not
10 adopt a - a clear evidence test, but the district court in
11 the first instance, in his first decision, did weigh the
12 public interest against the privacy interest and found
13 that as to all of the photographs, the privacy interest
14 prevailed.

15 I would like to - I would like to return to the
16 - the family's privacy interest and make one more point,
17 which is that law and tradition treat the moment
18 surrounding death as special, private family matters. A
19 family generally has the right to decide how to conduct
20 its leave-taking and how to dispose of the body of a loved
21 one with dignity. At a funeral, a family may choose
22 whether a coffin is open or is shut, and they have that
23 choice even if the deceased person was a public official.
24 Here, the Foster family decided that the coffin be shut,
25 and to effectively open it now by disclosing the

1 photographs would be an unconscionable invasion of the
2 family's privacy interest.

3 In the Reporters Committee brief, the contention
4 was made that the invasion of sorts here would be minimal
5 and would impose no meaningful additional harm. That
6 assertion is just simply wrong, and those claims ignore
7 the potent and the moving declarations submitted in this
8 case by Ms. Anthony and Ms. Moody. These declarations
9 express what any family in the circumstance would feel,
10 and they show why law and tradition treat death as a
11 private, family matter.

12 Mr. Foster's sister, Ms. Anthony, in her
13 declaration, recounted her nightmares and heart-pounding
14 insomnia each time she has seen the leaked photograph of -

15 QUESTION: Thank you. Thank you, Mr. Hamilton.

16 Mr. Favish, am I pronouncing your name
17 correctly?

18 ORAL ARGUMENT OF ALLAN J. FAVISH

19 ON BEHALF OF RESPONDENT FAVISH

20 MR. FAVISH: Yes, Chief Justice, thank you.

21 Mr. Chief Justice, and may it please the Court:

22 I can think of no clearer definition of the
23 phrase, personal privacy, as Congress used it in exemption
24 7(C) than what this Court said about that phrase in the
25 Reporters Committee case when it cited the work of former

1 Solicitor General Charles Fried and other noted scholars
2 on what the definition of privacy is: the right to control
3 information about yourself. That's what I base this case
4 on. I want you to stick with what you said on that point
5 in 1989.

6 QUESTION: The issue wasn't before the Court.
7 There were no family members. It was an individual, so it
8 was natural for the Court to address it.

9 MR. FAVISH: Justice Ginsburg, the definition of
10 privacy as intended by Congress in exemption 7(C) was
11 before the Court in Reporters Committee, and this Court -

12 QUESTION: But the - the Court didn't have a case
13 that involved, say, for example, what was presented in the
14 Challenger case. It didn't come here, but it did go to
15 the district court and the D.C. Circuit.

16 MR. FAVISH: I agree -

17 QUESTION: Are - are you saying that Reporters
18 Committee showed that that decision was wrong?

19 MR. FAVISH: No. I - I agree with you that
20 Reporters Committee did not involve death-related
21 documents, if that's what you're saying. I agree on that
22 point. But Reporters Committee gave only one definition
23 of privacy as intended by Congress, and that definition
24 should apply to all circumstances in which FOIA requests
25 may come up.

1 QUESTION: There's a tradition going back
2 thousands of years in human life. You can go back to
3 Antigone, Euripides, every major religion, respect for the
4 dead, respect for survivors, and that runs through every
5 religion, through Greek myth, tragedy, and why isn't that
6 important enough to human life to believe that Congress
7 also intended to encompass that?

8 MR. FAVISH: I believe it is an important
9 interest, but Congress left no indication that it intended
10 for that interest to be protected by the privacy language
11 in exemption 7(C).

12 QUESTION: Well, if the history is totally
13 silent, why wouldn't we assume that Congress intended to
14 recognize something so deep in human nature?

15 MR. FAVISH: Well, the - the legislative history
16 isn't totally silent.

17 QUESTION: No, I mean if they said, no, no, we do
18 not intend to respect this sacred tradition, fine. But I
19 bet they didn't say that, and for good reason.

20 MR. FAVISH: They did not say that, but they did
21 talk about personally identifying details and government
22 agencies where person -

23 QUESTION: Are you reading from the legislative
24 history?

25 MR. FAVISH: From the legislative history, which

1 is at page -

2 QUESTION: Why don't you use the text of the
3 statute?

4 MR. FAVISH: Yes.

5 QUESTION: I would - I would think that your
6 response to - to Justice Breyer would be that the - that
7 the word privacy is not a - the normal way of - of
8 expressing those concerns for respect for the dead.

9 MR. FAVISH: I agree, I agree, and that's why I
10 cited what this Court did in Reporters Committee, and
11 those concerns are valid and those concerns should be made
12 to Congress in an attempt to get them to add another
13 exemption to the FOIA, if that's what the Government and
14 the Foster respondents want. We know that -

15 QUESTION: You've heard - you've heard Mr.
16 Hamilton mention aspects of how the revelation of
17 documents, pictures of the dead, can injure a survivor.
18 Why isn't the word privacy broad enough at least to cover
19 that?

20 MR. FAVISH: That's not the way this Court
21 defined it in Reporters Committee. That's not the way
22 I've seen it defined anywhere else except a few
23 aberrational cases, which by the way -

24 QUESTION: Well, one - one of the - one of the
25 definitions that I think we instinctively assume is the

1 very simple one that Justice Brandeis used, the right to
2 be let alone. That is at the - at the heart of a lot of
3 privacy thinking in our law, and the right to be let
4 alone, I suppose, would encompass at least two things
5 relevant in this case. One is the right not to be
6 assaulted by these photographs, which will be very
7 upsetting. That is - that's certainly not being left
8 alone when - when you have to go through that.

9 And the second consequence, I would suppose, of
10 publication is simply even in the narrowest definition of
11 privacy, even apart from the Brandesian sense. If these
12 things are going to be published, the family is going to
13 be subject to intrusive inquiries again. People are going
14 to ask them for comments on it. They're going to go to
15 their house again and take a picture of the front of the
16 house. Why aren't these interests, which at this time in
17 our history I think do tend to fall with - within the
18 concept of privacy, easily encompassed by the - the sense
19 of privacy in the exemption?

20 MR. FAVISH: The right to be let alone was not
21 the sole expression of the definition of privacy in that
22 article. In fact, in Reporters Committee -

23 QUESTION: Well, nothing it - I - I'm not
24 suggesting - your - I mean, your argument is based upon
25 the fact that there has to be one narrow definition of

1 privacy encompassed by this word, and no other. You've
2 gone back to a case in which we were talking about the
3 interests of the living, and you say it can't be anything
4 more than that. Why do you make the assumption that
5 privacy is such a circumscribed concept in the exemption?

6 MR. FAVISH: Well, the word privacy, if it's
7 going to be meaning the right to be let alone in its
8 broadest sense, I suppose anything that could be
9 considered a tort then would be considered a violation of
10 somebody's privacy right.

11 QUESTION: Mr. Favish, do - do we have any case
12 law that suggests that the exemptions to the Freedom of
13 Information Act are to be narrowly construed?

14 MR. FAVISH: Well, sure, this Court's decision in
15 Rose, Department of Air Force, there are many cases -

16 QUESTION: Isn't that your - isn't that your
17 response to why you should not think that privacy means
18 the right to be let alone?

19 MR. FAVISH: Exactly.

20 QUESTION: Or anything beyond its narrowest
21 meaning?

22 MR. FAVISH: I - I -

23 QUESTION: I assume that that's your argument?

24 MR. FAVISH: Yes, absolutely. That's established
25 that these are to be narrowly construed, and that was a

1 part of the legislative intent of Congress to have the
2 exemptions clearly delineated, specific, so that there
3 would be clear standards. In fact, that was the - the
4 reason for the Freedom of Information Act being enacted in
5 1966, because the prior enactment was allowing the
6 Government to take ambiguous language and cover every
7 document with it.

8 So if you are going to come up with another
9 definition of privacy, it has to fit within that
10 legislative intent.

11 QUESTION: Are you saying that this Court,
12 because of the definition in Reporters Committee, has
13 already recognized that it's got to be the individual that
14 is in the photograph and families are out of it? That it
15 - that - that's - so you would - you would say the D.C.
16 Circuit was wrong, the district court in the Challenger
17 case, which involved the voices of the people?

18 MR. FAVISH: Okay. Two - two parts to your
19 question. First, as to your first part, based on what
20 this Court did in Reporters Committee, I'd say privacy in
21 this context is the right to control information about
22 yourself. If the survivors have no information in that
23 photograph or document, they have no privacy interest
24 here. With regard to the Challenger case, the D.C.
25 Circuit in Challenger did not reach this issue. The sole

1 issue they decided was whether or not the threshold had
2 been met in this exemption (C) case, which was whether the
3 file was a personnel, medical, or similar file.

4 QUESTION: Yeah, but it went back to the district
5 court.

6 MR. FAVISH: The district court made the decision
7 that there was a privacy interest, but it wasn't the D.C.
8 Circuit that made that decision, and the D.C. -

9 QUESTION: But in - in any event, you would say
10 that district court decision was off-limits because this
11 was a case of survivor grief, no information about the
12 survivors?

13 MR. FAVISH: Yes, I would. And I'd like to point
14 to two cases, one of which has already been cited to you
15 in the brief by the Silha Center, one of the amicus, and
16 that's Cordell v. Detective Publications. It's a Sixth
17 Circuit opinion from 1969. And also, a case that hasn't
18 been cited to you yet is a Federal district court case
19 called Young v. That Was The Week That Was, and that's at
20 312 F. Supp. 1337. The beauty of these two Federal cases,
21 they're both from 1969, which is just three years after
22 Congress first enacted FOIA, just a few years before they
23 put the privacy phrase in exemption 7(C). They talk about
24 the common law definition of privacy and -

25 QUESTION: Well, if - if they were decided in

1 1969, why are they not in your brief?

2 MR. FAVISH: Well, I didn't - I filled up my 50
3 pages and I didn't address this specific issue, other than
4 citing Reporters Committee.

5 QUESTION: Well, on - on - on Reporters
6 Committee, maybe you'll disagree, but what I think is - is
7 - is the key language is in roman IV, where the Court
8 says, to begin with, both the common law and the literal
9 understandings of privacy encompass the individual's
10 control of information concerning his or her person. It
11 doesn't say consists of or is defined, it says encompass.
12 The Court couldn't have been more careful to use a word to
13 say that this is - that it includes. It doesn't say it's
14 exclusively confined to.

15 MR. FAVISH: I - I -

16 QUESTION: I - I just think that's a very unfair
17 reading of that sentence. Now, if you have something
18 else.

19 MR. FAVISH: No, well, then I look at - well,
20 first of all, I generally agree with what you just said.

21 QUESTION: I - you - you agree that that is -
22 that's the key sentence that we're talking about.

23 MR. FAVISH: Yes, and - but I don't - I disagree
24 that it's unfair, because then I look at what was cited by
25 the Court, and all these scholarly articles talk about the

1 right to control information about yourself. And I see
2 nothing else in the word privacy from the common law,
3 other than a minority of aberrational cases, and certainly
4 nothing in the legislative history that would come up with
5 this relational tort, this survivor privacy -

6 QUESTION: Well, but that's what we were involved
7 with. It - it's not our style to say, now we have before
8 us the question of whether there is this - privacy
9 includes control of the individual's information about
10 himself. Now, of course, there are many other
11 definitions, but we - we don't write opinions that way.

12 MR. FAVISH: Right. I agree, but if you look at
13 the scholarly articles that you cited, none of them
14 endorse this survivor privacy theory. They talk about
15 privacy as the right to control information about yourself
16 exclusively.

17 QUESTION: Well, Mr. Favish, now, the court below
18 didn't really rest on that ground, did it? I mean, you -
19 you didn't - the court below didn't think that privacy was
20 limited to this - to the deceased?

21 MR. FAVISH: Neither the district court nor the
22 Ninth Circuit -

23 QUESTION: No.

24 MR. FAVISH: - accepted that.

25 QUESTION: And so I assume you may want to

1 address the other arguments in the case.

2 MR. FAVISH: Certainly. If you do -

3 QUESTION: Do you defend the approach taken
4 otherwise by the courts below?

5 MR. FAVISH: No, I don't. And if you do get to a
6 second step where you are going to be balancing whatever
7 privacy interest you might find here against the public's
8 interest, then you have an overwhelming - an overwhelming
9 case that's been established showing that there was
10 government misconduct here, at least negligence. And I
11 talk about the government conduct on two separate levels.
12 One, there was government conduct in investigating Mr.
13 Foster's death, finding out what happened to him. Second,
14 there was government conduct in reporting about that death
15 and the investigation to the public. The primary
16 reporting agencies here were the Fiske and Starr OICs.

17 Now, with regard to the first area of government
18 conduct, the investigation as to finding out what
19 happened, it's just educated guesses that the public can
20 make about whether there was any negligence here. But
21 with regard to the second area of whether or not the
22 reporting conduct by the Government was at least
23 negligent, we know to a 100 percent certainty that there
24 was at least negligence, because we know that - let me
25 talk about what Justice Scalia talked about, the autopsy

1 report.

2 To be more correct, Your Honor, it was a - a
3 report by the only doctor to view Mr. Foster's body at the
4 park. It was not the autopsy report. It was a two-page
5 document. Page 2 talked about the death-shot being mouth
6 to neck. Mr. Hamilton stated that Mr. Starr dealt with
7 that in his report. That's not true. Mr. Starr ignored
8 page 2 of the Haut report. That's one of the problems
9 here. We talk about these different investigations.
10 Well, nobody investigated that language on the Haut
11 report. Nobody investigated the FBI -

12 QUESTION: Explain how the - the four documents
13 that we're concerned with don't talk about - none of them
14 show head and neck, so I don't - we - we hear only about
15 those four documents, right? Because the district court
16 and the Ninth Circuit said, right, not all ten but only
17 those four? And none of those four have anything to do
18 with head and neck.

19 MR. FAVISH: I - I - I'm - I'm not sure I follow
20 your question. I - I understand that all 10 photos are at
21 play here because -

22 QUESTION: Well, that - that's what I'd like
23 clarified, because I thought that we are reviewing a
24 decision that the Government has asked us to review, which
25 said, Government, disclose four photographs.

1 MR. FAVISH: My understanding is that the
2 petition that was granted by the Government had, as its
3 question presented, was the Office of Independent Counsel
4 correct in withholding all of these photographs? And
5 under the -

6 QUESTION: But the court below said yes with
7 respect to six of them. So how do we get to review that?

8 MR. FAVISH: Yeah, the -

9 QUESTION: Didn't you cross-petition on the six?
10 I thought you cross-petitioned.

11 MR. FAVISH: Yes, I did, and that's being held
12 over.

13 QUESTION: That's the answer.

14 QUESTION: Right.

15 MR. FAVISH: So I believe all 10 photos are at
16 play here in what decision you come up with, because the -
17 all the issues presented by all three petitioners are
18 subsumed under the question presented in the petition that
19 you granted.

20 QUESTION: I'm worried about - suppose you won. I
21 take it the police investigate hundreds of thousands or
22 millions or crimes every year, and in those investigations
23 they may investigate people whom they later conclude are
24 innocent, perhaps again hundreds of thousands of millions
25 of them. And, of course, there might, in respect to those

1 people, be lots of newspapers or others who would like to
2 have the police records about people found to be innocent.

3 Now, what would protect these thousands or
4 hundreds of thousands of innocent people from having the
5 police investigation of them displayed on the front page
6 of their local paper if you were to win this case?

7 MR. FAVISH: Well, if I was one of those people
8 that you're talking about and -

9 QUESTION: Yes, well -

10 MR. FAVISH: - and there's information about me
11 in the document, I have a privacy interest in the
12 document, is what my position is.

13 QUESTION: Well, if you - but suppose you won
14 this, if you won it, then you and everybody else, let's
15 say millions of people, you don't mind perhaps, or not
16 enough, you don't mind enough, but a lot of people would
17 mind having a police report about them on the front page
18 of the local paper.

19 MR. FAVISH: Well, then, in that case -

20 QUESTION: Now, what is it that - if you win, I
21 don't see that those people would have any protection
22 whatsoever.

23 MR. FAVISH: The protection would be in the
24 balancing that's done to see -

25 QUESTION: The balancing would be that the police

1 had found them innocent, and it's not that hard if you win
2 this, where there have been five investigations, for
3 somebody to say, oh, there was a police cover-up, they
4 weren't really innocent.

5 MR. FAVISH: I -

6 QUESTION: And if there are two investigations,
7 they'll still say it, and there'll always be something
8 that isn't perfect about the investigation, so they'll
9 have a peg to hang their hat on.

10 MR. FAVISH: Under the balancing, all the factors
11 must be taken into account. We have an almost unique
12 situation here of a deputy White House counsel, public
13 official, very close to the President of the United
14 States, who was under investigation at the time, there
15 were documents related to that investigation in Mr.
16 Foster's office, that is why Kenneth Starr and Robert
17 Fiske investigated this. We're talking about the highest
18 levels of government where there's a mysterious death by
19 gunshot. This is not one of the cases that you pose a
20 hypothetical about. This is something unique and -

21 QUESTION: But I don't see how you can confine it
22 to uniqueness. Why doesn't everyone in every hometown in
23 America have a - a very significant interest in whether
24 their police department is adequately investigating and
25 evaluating reports of homicide. Of course they have an -

1 an interest in that.

2 MR. FAVISH: I -

3 QUESTION: Every - everyone in - in - in any
4 Federal district has an interest in whether the United
5 States Attorney and the FBI and so on are investigating
6 serious crimes, and I - I don't see how you can confine
7 this to what you call the unique case.

8 MR. FAVISH: I - I'm not saying it would be
9 confined. I'm saying that this is what sets those other -
10 this case apart from the others. But in principle, unless
11 it falls within one of the exemptions, then that
12 information would have to be made public -

13 QUESTION: So -

14 MR. FAVISH: - under the FOIA as it currently
15 exists.

16 QUESTION: But here's the - I think one of the -
17 the - one of the things that's bothering Justice Breyer,
18 and it's bothering me, if we accept as broad a principle
19 as you argue for, is this: that one of the things that -
20 that most police investigators learn very early on is that
21 when the investigate a crime and they investigate a
22 suspect, the suspect's old friends and enemies come
23 forward, and the latter frequently even ups some old
24 scores.

25 The amount of misinformation that is

1 intentionally communicated to law enforcement officers is
2 enormous. They have to evaluate that, and it seems to me
3 that that kind of misinformation is - is - is going to
4 come very close to the front page in most cases if - if a
5 principle as broad as yours is accepted.

6 MR. FAVISH: Well, first of all, I believe in the
7 FOIA, in exemption 7, there is an exemption for ongoing
8 investigations, so much of what you're talking about -

9 QUESTION: Well, yeah, but the - the problem for
10 the person being investigated who is ultimately exonerated
11 is going to be the same the day after the investigation is
12 - is over. So that - that doesn't answer the problem.

13 MR. FAVISH: Yeah. Now, I'm just talking about
14 the privacy exemption in 7(C). Now, I don't know in your
15 hypothetical whether there would be other exemptions to
16 prevent disclosure in those situations. I'm not
17 commenting on that. Now, with regard - yes.

18 QUESTION: Neither - neither do I, in fact.

19 QUESTION: Mr. Favish, here's - here's my - I
20 mean, one - once you get past the first - the first issue,
21 whether the privacy exemption at all covers this, if you
22 assume it does cover it, you have relatives here who are
23 going to be very much - very much harmed by - by this, as
24 is shown by the mere fact that they've conducted this
25 lengthy litigation. It's lasted how long, and I'm sure

1 it's been expensive.

2 Now, what is the interest on the other side? If
3 - if you - if you had a plausible case that - that these
4 investigations reached the wrong conclusion, I'd say,
5 yeah, that's a pretty significant governmental interest.
6 But I don't see that here. I - you - you - you've just
7 demonstrated some foot faults in - in each of the
8 investigations. Oh, this - this investigation made this
9 mistake, this other investigation made the other mistake.
10 Who cares? I mean, you really think that that is a matter
11 of - of significant moment for - for the country, that
12 there was an isolated mistake in - in one and another of
13 the investigations? Who cares?

14 MR. FAVISH: Justice Scalia, I`would not
15 characterize them as foot faults. I think these are major
16 omissions of significant evidence that pointed away from
17 the Government's official conclusion, and what it
18 establishes is that the government reports are not
19 trustworthy. I agree that in the end those reports may be
20 correct and it was suicide in the park.

21 Again, like I said earlier, I can just make
22 educated guesses about that. I'm not saying that it was
23 definitely something other than that, but I am saying that
24 when you have a high-level government official involved in
25 this kind of investigation, and then you have so many

1 investigations by the Government, apparently to get it
2 right, that it took so many, you have a public interest
3 here, unlike almost any other case I could imagine.

4 QUESTION: Well, why should the high level of the
5 victim make that much difference?

6 MR. FAVISH: As opposed to just an innocuous
7 neighbor down the street, perhaps.

8 QUESTION: Well, say a - a public interest in
9 something that happens in Albuquerque, New Mexico, maybe
10 the assistant to the mayor is shot.

11 MR. FAVISH: Because we're dealing with somebody
12 who was working close to the President of the United
13 States and we're talking about the Freedom of Information
14 Act, whose primary purpose is to allow the people to be a
15 check on government, not only to -

16 QUESTION: Well, but - but why - why wouldn't
17 that be just as true of this incident, hypothetical
18 incident in Albuquerque as the Vince Foster slaying?

19 MR. FAVISH: Well, it very well might be with
20 regard to city or state government and states have their
21 open records acts, and as we heard before, some of them
22 prohibit death photos, but they do that by legislation.
23 We know that the State of Florida did that in response to
24 amicus Teresa Earnhardt's plea. That's what should be
25 done here if they want the Federal Government to follow

1 the lead of the state legislatures here.

2 It's not for the courts, with all due respect,
3 to rewrite the FOIA exemption, so I - I'm not disagreeing
4 that that's a valid concern, but the way -

5 QUESTION: Well, you're - you're - you're getting
6 away from the hypothetical. The hypothetical, if you - if
7 you insist on taking this line, could be refined so that
8 we assume New Mexico has exactly the same statute and has
9 interpreted exactly the same way. Then you have to answer
10 the hypothetical.

11 MR. FAVISH: Oh, absolutely then. If - if the
12 balancing is done and you're talking about a law like FOIA
13 where the primary purpose is to allow the people to ensure
14 that their government is honest, because that's the heart
15 of our democracy and we're talking about the integrity of
16 our law enforcement agencies, I can think of no higher
17 public interest than what's being asserted here. And
18 again, all of this is going to have to be -

19 QUESTION: So - so - so then it doesn't just turn
20 on the fact that it's Vince Foster and that - and the
21 Chief Justice's point is - is that this was going to apply
22 to every police department, every - every local government
23 in the country that has an act like this?

24 MR. FAVISH: Well, in principle, yes. How the
25 balancing would come out in each individual case would

1 depend on the ad hoc balancing, but the principles would -
2 would be the same if the law is the same, I agree.

3 QUESTION: When a person goes to work for the
4 Government, on top of everything else, he even loses a
5 private right to bury the body. I mean, I'm speaking
6 metaphorically, but, I mean, there are a lot of
7 disadvantages in government, and you're saying one of the
8 things would be that after death there is no protection,
9 even to see that that body is buried and the photographs
10 disappear for the - for the -

11 MR. FAVISH: Well -

12 QUESTION: It would just go on forever.

13 MR. FAVISH: Well, we're not talking about
14 interfering with the - the burial process.

15 QUESTION: No, I know. I'm speaking
16 metaphorically. I have Antigone in my mind.

17 (Laughter.)

18 MR. FAVISH: Again, as I read the FOIA exemption
19 7(C), the privacy exemption, Congress has not legislated
20 that the Government is allowed to withhold death
21 photographs under this privacy exemption. If we think
22 that's a good public policy to enact, we should get
23 Congress to hold hearings on it and we'll find out all the
24 yeas and the nays and that's how good legislation comes.
25 And that's what should be done here and -

1 QUESTION: What does privacy cover without that?
2 Are you suggesting that there be a catalog A to Z of - and
3 the - and the word privacy within the meaning of 7(c)
4 covers, and that's -

5 MR. FAVISH: Oh, in terms of what Congress might
6 do or what this Court might do?

7 QUESTION: No, in terms of - the Court has no
8 leeway unless Congress has such a catalog and this is one
9 of the enumerated items -

10 MR. FAVISH: Well, we know that Congress used the
11 phrase, personal privacy, in the statute, and now the
12 debate is over what did they mean by that. And
13 apparently, people are scribing words, Alice-in-
14 Wonderland-like definitions to words, and if we go down
15 that route -

16 QUESTION: But it's not very Alice in Wonderland-
17 like to take the Brandeis definition that started this
18 all.

19 MR. FAVISH: What I like about the Brandeis
20 article is -

21 QUESTION: I think it's Alice in Wonderland-like.

22 MR. FAVISH: What I like about the Brandeis
23 article is the section of that article that was cited by
24 this Court in Reporters Committee. The Brandeis article
25 was one of the six scholarly articles. Now, keep in mind,

1 the Brandeis article, 1890, was maybe the earliest trying
2 to come up with a definition of privacy, so the language
3 isn't as precise as what, for instance, former Solicitor
4 General Fried came up with in his seminal 1996 article,
5 also cited by this Court.

6 So I would say that the best definition that
7 provides the clearest workable standard is the right to
8 control information about yourself, and again, on the
9 second point here, I - I won't go down the litany of
10 things that are in the brief talking about how there was
11 misconduct, at least negligence with regard to reporting
12 this case, but once I've established that, which I have, I
13 think that the Government can no longer be trusted to
14 filter the raw evidence to the people in this case, and I
15 don't see how in a democracy that depends on the integrity
16 of its law enforcement agencies in a case where you've had
17 - well, by the way, there haven't been five
18 investigations. For instance, the Senate Whitewater
19 Committee stated out the outset of its two-day hearings
20 they're not looking into whether Mr. Foster committed
21 suicide or not. That's in the record. Look at ER 603 and
22 those pages.

23 So we're also looking at a situation with regard
24 to the Fiske and Starr offices using FBI agents as part of
25 their investigation, where the FBI did the initial

1 investigation with the Park Police. That's all in the
2 record. There's a conflict of interest there when you
3 have FBI agents participating in an examination of what
4 they already did.

5 So to call this five separate investigations is
6 highly misleading, and I think that the only investigation
7 that will matter in this case is the one that the people
8 can do directly by seeing the raw evidence for itself,
9 because for whatever reason, and I don't impugn the
10 motives of Judge Starr or anybody else, I have no personal
11 knowledge that he actually wrote the report. He had
12 lawyers in his office. I don't know what the mechanics
13 was. I want to make that very, very clear.

14 I just want it to be known that we know
15 objectively, and it's undisputed, there were major pieces
16 of evidence omitted from the Fiske and Starr reports that
17 point to something other than the official conclusion, not
18 just little details, because those things, I agree, can be
19 explained sometimes. We're talking about major, major
20 issues, and those are spelled out in the brief in detail
21 for you.

22 QUESTION: Mr. Favish, are there any other
23 Federal statutes that use the term privacy?

24 MR. FAVISH: There is the Privacy Act enacted in
25 1974, and there is a definition which talks about

1 personally identifying details, and I don't have that at
2 hand right now, but it's consistent -

3 QUESTION: You don't think that covers relatives
4 who are deceased?

5 MR. FAVISH: I don't think it enacts a definition
6 that gives somebody a privacy interest in a document -

7 QUESTION: I don't either.

8 MR. FAVISH: - which has no information about
9 them, and I think that's indicative also. And my one last
10 point has to do with what the Ninth Circuit did here in
11 addition to the reasons I've already explained. They
12 basically said that it isn't the release of the photos
13 that will cause the harm, it's what's going to be done
14 later, media intrusion and so forth, which I think
15 violates what Justice Scalia said in his concurrence in
16 the Ray case about the derivative uses.

17 Now, Ray was an exemption 6 case, but it focused
18 on the word that's common to both exemptions, constitute,
19 would the release or production constitute the invasion of
20 privacy? What the Ninth Circuit came up with really
21 violates what Justice Scalia said in his concurrence in
22 Ray, with which I - I agree wholeheartedly.

23 QUESTION: Do you think the Ninth Circuit is
24 bound to agree with Justice Scalia's concurrence?

25 (Laughter.)

1 MR. FAVISH: I - I -

2 QUESTION: You just think they would be well
3 advised to do so.

4 (Laughter.)

5 MR. FAVISH: I think they would be well advised
6 to have at least noted what Justice Scalia said and
7 compare it to what they were doing, and if they had done
8 that, they would see that what they did was wrong on that
9 score. And that's really all I have. I thank you.

10 QUESTION: Thank - thank you, Mr. Favish.

11 Ms. Millett, you have four minutes remaining.

12 REBUTTAL ARGUMENT OF PATRICIA A. MILLETT

13 ON BEHALF OF THE PETITIONER

14 MS. MILLETT: Thank you, Mr. Chief Justice.
15 Justice Breyer, you hit the nail on the head when you said
16 that if this type of investigation isn't enough, what's
17 going to happen in the routine case? This is the gold
18 standard for law enforcement investigations, and if in
19 this case, the fact that someone can think of something
20 more that should have been said, something more should
21 have been done, something more should have been revealed,
22 then in the run-of-the-mill routine law enforcement case,
23 there will be little protection left for privacy.

24 And the problem won't be just that this
25 information will end up on the front page of the New York

1 Times, but under the 1996 amendments to the FOIA, if - if
2 the Government anticipates three or more requests for
3 information, we're obliged to post the information on our
4 Web sites for photographs taken after 1996 - November
5 1996. You won't need to go to findadeath.com. You can go
6 to DepartmentofDefense.gov to find pictures of - the 50
7 pictures that are routinely taken during autopsies of
8 military office - officials killed overseas.

9 Justice Kennedy, you had asked about the remand,
10 whether a remand was necessary. It is not in this case.
11 On pages 56A through 59A of the petition appendix, the
12 district court, before being redirected by the court of
13 appeals, we think erroneously, ruled that the - the
14 pictures should be withheld applying a less demanding
15 standard than the one that we approached, that it just
16 balanced the allegations of misconduct against the privacy
17 interest, and concluded that the privacy interest still
18 outweighed, assuming that - that just allegations count
19 for something on the public interest side.

20 So if this Court agrees with the Government's
21 position or requires anything more than allegations of
22 misconduct, there'll be no need to remand. It's also not
23 a discretionary decision, it's a de novo review. The
24 balancing is undertaken in the first instance, but it's
25 reviewed de novo by the court of appeals and de novo by

1 this Court.

2 Justice Scalia, you talked about this doesn't
3 sound like privacy. Well, privacy is a language that has
4 been used by not all, but a number of common law courts
5 that are cited in our opening and reply brief. And this
6 Court's interpretation of the concept of privacy under the
7 Freedom of Information Act has gone far beyond what tort
8 law would protect. There - I don't know that there's any
9 court case that would suggest that rap sheets should be
10 public records, like rap sheets would be protected under
11 privacy conceptions in common law, so it would be
12 extraordinary in this case to decide that the language
13 Congress employed, personal privacy, is intended to be
14 interpreted more narrowly than it has, at least at some -
15 at some courts at common law.

16 Justice Scalia, you also asked about narrowly
17 construing the exemptions. It's - I agree that there are
18 cases that say that, but in John Doe Agency v. a John Doe
19 Corporation, this Court made clear that these exemptions
20 still have to be interpreted in a way that allows their
21 exempt - the purposes of the exemptions to be served. And
22 in a - and they should not be construed in the non-
23 functional manner. If law enforcement is to become the
24 instrument - in the eyes of the public, the law
25 enforcement, the Federal Government, will be the

1 instrument of these types of disclosures and causing this
2 type of pain to families that is likely to have a chilling
3 effect on people's willingness to provide information to
4 law enforcement.

5 You asked about other statutes, and we discussed
6 the Privacy Act statute. The Privacy Act statute doesn't
7 apply to survivors, but that's because the language is
8 specifically different. The Privacy Act talks about -
9 defines the - the records that are covered in terms of
10 information about an individual and information that - to
11 that pertains to the individual. It has a sort of very -
12 and it has to be information contained in a system of
13 records that - where information can be retrieved by an
14 individual identifier. It's a very narrow and specialized
15 definition. It's exactly the type of definition that
16 Congress would have used if it wanted a more narrow
17 approach. Thank you.

18 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Millett.
19 The case is submitted.

20 (Whereupon, at 10:58 a.m., the case in the
21 above-entitled matter was submitted.)

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25